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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THE ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, LEIGH PEGUES, Director of the Alabama Department of Environmental Management; and GUY HUNT, Governor of Alabama,

Petitioners,

v.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION; and CHEMICAL WASTE MANAGEMENT, INC.,

Respondents.

AMICUS BRIEF IN SUPPORT OF ALABAMA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS BRIEF SUBMITTED BY THE STATE OF OHIO ON BEHALF OF THE STATES OF ARIZONA, ARKANSAS, INDIANA, KANSAS, NEVADA, TENNESSEE AND WASHINGTON

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STATEMENT OF INTEREST

Two of the great and pressing pollution problems facing the nation today are the need for the siting of hazardous waste disposal facilities and the need for effective waste management. Unfortunately, the Court of Appeals below has broadly and anachronistically expanded the holding in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), in a manner which thwarts these goals in the face of our vastly increased knowledge about the dangers of hazardous waste gained in the last thirteen years.

At pp. 16-17 of Petitioner's Memorandum, Alabama has concisely set forth at least eight reasons why *City of Philadelphia* should not apply to hazardous waste cases. The *amici* particularly emphasize the similarities between hazardous waste and those items permissibly banned by states in the quarantine cases long ago decided by this Court. Further, hazardous waste poses dangers not acknowledged in *City of Philadelphia*, and the *amici* seek a declaration that the Congressional mandate in the Superfund Amendments and Reauthorization Act of 1986[1] (SARA) permits actions such as those authorized in Alabama's Holley Bill, *Ala. Acts 1986, No. 89-788*, for the purpose of addressing a hazardous waste problem common to all states. Finally, the *amici* states refer the Court to the number of significant pieces of legislation discussed by the district court which lead to the inescapable conclusion that *City of Philadelphia*, insofar as it has been applied by the lower courts, is no more than a legal relic decided by this Court at a time at which the financial and environmental burdens which have ultimately proved to result from the disposal of hazardous waste could not have been fully realized.

Because of the overbroad and outdated application of *City of Philadelphia*, which arguably obligates states to accept hazardous waste without any qualifications imposed on the source thereof, a recent survey of forty-seven states found

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[1] Superfund Amendments and Reauthorization Act of 1986, P.L. 99-499.

that of eighty-one siting applications for commercial hazardous waste treatment and disposal facilities, only six are operating.[2] Not one operational hazardous waste landfill has been developed in the United States in the last ten years.[3] The Eleventh Circuit's misinterpretation of the clear intentions of the crafters of SARA will reaffirm this demonstrated tendency of states to succumb to political pressures opposing the siting of much-needed hazardous waste facilities.

Therefore, the concise reasons for calling for the Court's review are twofold. First, the *amici* states assert that hazardous waste, which is intrinsically dangerous to human life and the environment, is properly treated more like the quarantine items permissibly controlled by the states pursuant to earlier precedent of this Court, rather than deserving the Commerce Clause protection enjoyed by healthful, desirable goods such as apples and milk. Second, the Eleventh Circuit's interpretation of state authority over interstate hazardous waste movement under federal law thwarts, rather than furthers, the clearly expressed intentions of Congress and the United States Environmental Protection Agency in SARA.

SUMMARY OF ARGUMENT

This Court has never squarely addressed the issues attendant to the interstate transportation of hazardous waste. *City of Philadelphia* dealt exclusively with the interstate transportation of solid waste, an item inherently different from hazardous waste. The proper analysis for this discrete regulatory field of publicly-perceived "bads" is that contained in Chief Justice Rehnquist's dissent in *City of*

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[2] 18 Env't. Rep. (BNA) 1103 (Aug. 21, 1987) (citing survey of the New York Legislative Commission on Toxic Substances and Hazardous Wastes.)

[3] *Chemical Waste Management, Inc. v. Alabama Department of Revenue*, No. 90-1098-PH, Circuit Court of Montgomery County, Alabama (Feb. 28, 1991), p. 8, now on appeal to the Alabama Supreme Court, Case Nos. 190-1043 and 190-1044.

Philadelphia. Maine v. Taylor, 477 U.S. 131 (1986), a case engendered by that dissent, is the basis for proper decision in this case.

Even if this Court should determine that *City of Philadelphia* was properly expanded by the lower court to encompass the transportation and disposal of dangerous hazardous waste, the law deveioped in that case merits reconsideration. In light of our technological enlightenment and the regulatory changes which have occurred over the last thirteen years, the peculiar hazards associated with the hazardous waste industry must be both recognized as warranting the same considerations as the quarantine items permissibly banned in *Bowman v. Chicago & Northwestern R. Co.,* 125 U.S. 465 (1988), and clearly set apart from this Court's consideration of solid waste issues.

The objectives of the *amici* states can alternatively be accomplished by an examination of the decision of the court below interpreting Section 104(c)(9) of SARA.[4] Congress clearly intended to authorize state control over interstate movement of hazardous waste insofar as it would promote the siting of new and safer disposal sites. United States Environmental Protection Agency guidance documents and statements contained in the Federal Register clearly

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[4] Section 104(c)(9), 42 U.S.C. 9604(c)(9) provides:

> Effective 3 years after the enactment of the Superfund Amendments and Reauthorization Act of 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which -
>
> (A) have adequate capacity for the destruction, treatment or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20 year period following the date of such contract or cooperative agreement and are to be disposed of, treated, or destroyed,

establish that the intent of the Reauthorization was to enlist the individual states as critical partners in the success of the capacity assurance initiative, and to sanction state action like that embodied in the Holley Bill.

ARGUMENT

BROAD APPLICATION OF THE *CITY OF PHILADELPHIA* DECISION HAS FOSTERED PUBLIC OPPOSITION TO THE SITING OF NECESSARY HAZARDOUS WASTE FACILITIES

The political impasse in the hazardous waste facility siting process highlights the "Not In My Backyard" (NIMBY) nature of the problem. When North Carolina passed a restrictive hazardous waste permitting law in June of 1987 which effectively precluded the siting of a facility in the south-central part of the state, it was predicted that South Carolina's reaction to the law would spark a "hazardous waste civil war."[5] As anticipated, that legislation was the proverbial "shot heard around the world."

Other states have since joined in the controversy. In February, 1988, the Mississippi Legislature, reacting to citizen group pressures, introduced a bill to require county

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[4] Footnote 4 cont'd.

> (B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
> (C) are acceptable to the President, and
> (D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act.

42 U.S.C. 9604(c)(9).

[5] *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans,* Stone, Jonathan R., 15 Columbia Journal of Environmental Law 1 (1990) (quoting 19 Env't. Rep. (BNA) 173 (June 3, 1988)).

referendums to permit hazardous waste facility siting.[6] In December, 1988, the Utah Solid and Hazardous Waste Committee approved stringent state siting criteria for hazardous waste treatment, storage, and disposal, declaring "The [public] perception is Utah is going to be the dumping area of the country."[7] In addition, U.S. EPA has expressed concern over the siting rules adopted in at least six states.[8] Indeed, Alabama's Holley Bill is a reflection of the aversion expressed by states of being "up for grabs" by any state whose sole qualification for being entitled to use the Emelle facility was that it generated hazardous waste.

But, perhaps the best example of the depth of the hazardous waste civil war is the continuing dispute between North and South Carolina. Most recently, the entire South Carolina congressional delegation has urged U.S. EPA to cut off North Carolina's Superfund money under Section 104(c)(9) of SARA due to North Carolina's breach of a promise to site and build new hazardous waste treatment and disposal facilities of its own. Referring to their state's efforts to hinder its historical acceptance of 65% of North Carolina's hazardous waste exports, and citing the frustrations it had suffered in a recent adverse decision from the federal court which this Court is presented with the opportunity to correct, the South Carolina delegation wrote:

> "States like South Carolina which allow hazardous waste facilities to operate are being penalized because the U.S. Constitution prevents us from limiting out-of-state waste entering our borders."[9]

Thus, the South Carolina legislature has publicly declared

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[6] 18 Env't. Rep. (BNA) 2149 (Feb. 12, 1988).

[7] 19 Env't. Rep. (BNA) 1786 (Dec. 30, 1988).

[8] 18 Env't. Rep. (BNA) 2111 (Feb. 5, 1988).

[9] The Superfund Report (February 27, 1991), at p. 7.

the same sentiments as the *amici* states.

As a result of political pressures across the nation and the overbroad application of the Commerce Clause principles handed down in *City of Philadelphia* to the field of dangerous hazardous waste, states persist in their reluctance to authorize hazardous waste facilities. Included in these beneficiaries are states which are using *City of Philadelphia* as an excuse to send their hazardous waste to other states rather than responsibly siting their own facilities. Encouraged by overbroad applications of *City of Philadelphia*, these states will continue to irresponsibly dump huge amounts of hazardous waste on other states. To compound the problem, the United States Environmental Protection Agency (U.S. EPA) has proven its reluctance to use the heavy hammer of withholding Superfund monies under Section 104(c) of SARA, apparently recognizing the futility of such a counterproductive forfeiture.[10] As a result, states which have failed to meet their capacity assurance obligations have done so with impunity insofar as federal sanctions are concerned.

If the Eleventh Circuit Court's decision is left intact, states such as Ohio which have accepted their responsibility to dispose of, at a minimum, certain types of their own hazardous waste, are powerless to protect their valuable capacity or in any way control the influx of this dangerous and environmentally costly waste. The Circuit Court's undercutting of the capacity assurance "weapon" of waste import limitations, clearly intended to be available to the states in the legislative history of SARA and clearly contemplated in U.S. EPA interpretive guidance documents, leaves Alabama and the *amici* states defenseless.

Further, despite the tremendous national implications of its decision, the Eleventh Circuit inappropriately expanded the *City of Philadelphia* rationale to fill the void left by that opinion in the hazardous waste arena. The Court of Appeals simply failed to acknowledge the innate differences between

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[10] The Superfund Report (February 27, 1991) at p. 8.

solid waste and hazardous waste. Alternatively, if this Court determines that *City of Philadelphia* was properly applied by the lower court, the principles enunciated in that precedent are certainly of questionable application in the face of our greater knowledge regarding the gravity and permanence of the risks associated with the disposal of hazardous waste. Therefore, the *amici* states respectfully request that the Court grant the State of Alabama's Petition for Writ of Certiorari.

THE PRINCIPLES ESTABLISHED NEARLY THIRTEEN YEARS AGO CONCERNING SOLID WASTE TRANSPORTATION IN *CITY OF PHILADELPHIA* DO NOT APPLY TO THE UNIQUE CIRCUMSTANCES SURROUNDING THE TRANSPORTATION AND DISPOSAL OF INNATELY DANGEROUS HAZARDOUS WASTE.

As appropriately noted by Petitioners, this Court has never addressed a state's power to enact reasonable restrictions on the interstate movement of hazardous waste to protect public health and the integrity of its natural resources. With the exception of the vision evident in Chief Justice Rehnquist's dissent in *City of Philadelphia,* this Court has similarly never considered whether hazardous waste merits the same protections therein afforded to solid waste, or whether hazardous waste, as an item bearing striking resemblance to the permissible items of quarantine in other precedent of this Court, is even worthy of commerce clause protections.

In fact, in his dissent in *City of Philadelphia,* Chief Justice Rehnquist would have upheld New Jersey's ban under the quarantine cases:

> [S]tates can prohibit the importation of items 'which, on account of their existing condition, would bring in and spread disease, pestilence and death . . .'

City of Philadelphia, 427 U.S. at 632, (Rehnquist, J.,

dissenting).

These "quarantine laws" are not considered impermissible protectionist measures even though they are directed against out-of-state commerce.

As so aptly articulated by Petitioners, the crux of this case is whether toxic and hazardous chemical wastes which can, in the words of the district court below, "*blind, cripple* or *kill,*"[11] are to be treated more like articles that spread "disease, pestilence or death,"[12] or like ordinary and publicly desirable articles of commerce such as milk[13] and apples.[14] The response to this rhetorical question should be made obvious by this Court's consideration of this timely issue.

The weakness in the broad application of *City of Philadelphia* to hazardous waste issues stems from the fact that that case was presented in terms which applied solely to the question of interstate dealings in solid waste. Apparently anticipating that all interstate waste issues could not be so generically decided, Chief Justice Rehnquist's dissent in that case was quick to recognize the artificial distinction made by the majority in its rejection of the pertinence of the quarantine laws because they focused on *transportation* of undesirables into the state, and their imposition of a lesser degree of state control over the risks posed by the ultimate *disposal* of potentially dangerous items within the state. Specifically, Chief Justice Rehnquist noted:

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[11] 729 F. Supp 797, emphasis added.

[12] See, *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Asbell v. Kansas*, 209 U.S. 251 (1908).

[13] *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

[14] *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977).

> I do not see why a State may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in ever increasing danger to the public's health and safety.

City of Philadelphia, 437 U.S. at 632-633 (Rehnquist, J., dissenting). Assuming *arguendo* that this dichotomy between transportation and ultimate disposal is valid for solid waste, it should not be applied to hazardous waste. Instead, the severe dangers inherent in hazardous waste disposal compel the rationale provided by the Court's precedent in the quarantine cases. In light of the apparent inconsistency evident in the majority opinion in *City of Philadelphia*, and considering the subsequent development of federal waste management legislation (see the district court's opinion for a list of statutes which demonstrates Congress' ever increasing recognition of the dangers inherent in the disposal of hazardous waste) since that decision, this Court should recognize that the knowledge and experiences gained in the last thirteen years merits an evaluation and definition of the Commerce Clause protections which may be afforded to hazardous waste under the federal Constitution. The hazardous waste industry of today is certainly quite different from the solid waste industry addressed in *City of Philadelphia*.

To aid in the Court's consideration, the *amici* states respectfully submit that *Maine v. Taylor*, 477 U.S. 131 (1986), a case engendered by Chief Justice Rehnquist's dissent in *City of Philadelphia*, is controlling in the discrete field of hazardous waste. In *Maine v. Taylor*, the State of Maine banned all importation of live baitfish for the stated purpose of insulating its domestic baitfish crop from the harms posed by the introduction of damaging parasites. Although the statute facially discriminated against the interstate transportation of live baitfish, this Court upheld the ban as a reasonable means of accomplishing a legitimate state goal.

In *Maine v. Taylor,* the Court recognized that the Commerce Clause does not prevent states from regulating substances where their risks are known. The Court explained this principle as follows:

> "Not all intentional barriers to interstate commerce are protectionist, however, and the Commerce Clause "is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community."

477 U.S. at 148, n. 19.

The Court, speaking through Justice Blackmun, also recognized the practical limitations of the Commerce Clause where *unknown* environmental risks are clearly at issue, stating as follows:

> ". . . Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. [T]he constitutional principles underlying the Commerce Clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred . . . "

477 U.S. at 148. Therefore, subsequent to *City of Philadelphia,* the Court has recognized that the states may also regulate substances where their risks are imperfectly understood.

The dangers of hazardous wastes consist of both known and imperfectly understood risks. Therefore, the rationale of *Maine v. Taylor* applies with great force to hazardous waste regulation. For that reason, the solid waste principles set forth in *City of Philadelphia* should not be applied to hazardous waste.

Despite the dangers of hazardous waste, including both known and imperfectly understood risks, the *amici* states

do not seek the extreme measure of totally banning hazardous waste importation. The *amici* states seek the dual goals of *limiting* the volume of waste which any facility is obligated to accept, and encouraging a more equitable national sharing of responsibility for hazardous waste management through regional cooperation and workable and enforceable siting criteria. These goals can be accomplished through a recognition of the peculiar hazards posed by intrinsically dangerous hazardous waste, and a clarification of the rule set forth in *City of Philadelphia* to allow environmentally responsible states to protect themselves from states which continue to ignore their fair share of the nation's hazardous waste burden.

EVEN IF THIS COURT WERE TO CONCLUDE THAT *CITY OF PHILADELPHIA* HAS BEEN PROPERLY APPLIED BY THE LOWER COURT, THE SUBSTANTIAL WEALTH OF KNOWLEDGE GAINED OVER THE LAST THIRTEEN YEARS REGARDING THE DANGERS AND COSTS ASSOCIATED WITH HAZARDOUS WASTE DISPOSAL MERITS A REEXAMINATION OF THAT DECISION.

Should this Court decide that *City of Philadelphia* has, in fact, been properly applied by the Circuit Court to the hazardous waste arena, the substantial increase in our knowledge about the dangers inherent in the transportation and disposal of hazardous waste merit reconsideration of the blanket protections afforded in that decision. With the benefit of nearly thirteen years of technological and statistical data about all facets of hazardous waste, it would be only logical to conclude that the modern waste industry is worthy of renewed consideration. Thus, this Court should grant the review necessary to make the parameters of the Commerce Clause reflective of our greater understanding of the gravity of hazardous waste issues.

THE HOLLEY BILL IS CONSISTENT WITH THE AUTHORIZATION CONFERRED BY CONGRESS UPON HAZARDOUS WASTE IMPORTING STATES

IN SECTION 104(c)(9) OF SARA TO RESTRICT USE OF THEIR FACILITIES AND THEREBY FORCE THE DEVELOPMENT OF NEW, SAFER HAZARDOUS WASTE FACILITIES

Alternatively, the objectives sought by the *amici* states can be accomplished by an examination of Section 104(c)(9) of SARA and a recognition that Congress clearly, though implicitly, has authorized state action like that embodied in the Holley Bill. In 1986, Congress recognized the need for regional cooperation in the field of hazardous waste management, and afforded each state the authority to ensure that every other state adequately planned for hazardous waste disposal capacity through the siting of newer and safer facilities.[15] Thus, in Section 104(c)(9), Congress intended that actions could be undertaken by individual states such as that evidenced in the Holley Bill. The right to restrict waste was designed as a valuable means of rewarding environmentally responsible states with the option of excluding waste from their hazardous waste facilities which was generated in a state choosing to ignore its federal capacity assurance obligations.

The validity of the Holley Bill is reinforced by the U.S. EPA's interpretation of SARA at numerous citations in the Federal Register.[16] Thus, Congress has authorized states with existing hazardous waste disposal capacity to restrict out-of-state access to those facilities, and has simultaneously removed Commerce Clause limitations that would have otherwise applied. It is this enlisting of the individual states

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[15] See, for example, H. Rep. 99-69, May 7, 1985 (H.R. 2005); H. Rep. No. 99-253(I), Aug. 1, 1985 H.R. 2817); H. Rep. No. 99-253 (II), Oct. 28, 1985) (H.R. 2817); H. Rep. No. 99-253(III), Oct. 31, 1985 (H.R. 2817); H. Rep No. 99-253 (IV), Oct. 31, 1985 (H.R. 2817); H. Rep. No. 99-253 (V), Nov. 12, 1985 (H.R. 2817); S. Rep. No. 99-11, Mar 18, 1985 (S. 51); S. Rep. No. 99-73, May 23, 1985 (S.51); H. Conf. Rep No. 99-962, Oct. 3, 1986 H.R. 2005); H.Rep No. 99-255, Sept. 4, 1985 (H.R. 3065).

[16] 53 Fed. Reg. No, 169, at 33618 (August 31, 1988); 53 Fed. Reg. No. 250, at 92783 (December 29, 1988); U.S. EPA OSWER Dir. No. 9010.00.

as critical partners in the success of the capacity assurance process which demonstrates the legality and desirability of state legislation like the Holley Bill.

Therefore, there is only one interpretation of Section 104(c)(9) which fulfills the Congressional purpose so clearly enunciated in these historical and interpretive documents. The Circuit Court erred when it determined that Congress had not, in fact, intended to exercise its authority under the dormant Commerce Clause to permit exactly the kind of beneficial activities evidenced in the Holley Bill, as a means of promoting nationwide siting of these much-needed hazardous waste facilities.

CONCLUSION

For all of the foregoing reasons, the *amici* states respectfully request that this Court grant Petitioner's Writ of Certiorari to the Eleventh Circuit Court of Appeals.

Respectfully submitted:

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